

PS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

RONALD NELSON,

Petitioner,

v.

21-CV-06470 DGL
ORDER

LYNN LILLEY,

Respondent.

Pro se Petitioner, Ronald Nelson, is a prisoner incarcerated at the Eastern Correctional Facility. Petitioner has filed a Petition for a writ of habeas corpus under 28 U.S.C. § 2254. Docket Item 1.

DISCUSSION

The filing fee for a petition for a writ of habeas corpus is \$5.00. 28 U.S.C. § 1914(a). Whenever a prisoner submits a petition for a writ of habeas corpus, the prisoner must either (1) pay the filing fee or (2) seek leave to proceed *in forma pauperis*. Under 28 U.S.C. § 1915(a)(1), the *in forma pauperis* motion must include an affidavit or affirmation establishing that the petitioner is unable to pay the fees and costs for the proceedings. It also must include a prison certification section, completed and signed by an authorized officer of the institution in which the prisoner is incarcerated, certifying both

the amount presently on deposit in the prisoner's inmate trust account and the prisoner's average account balance during the last six months.¹ 28 U.S.C. § 1915(a)(1)-(2).

Here, Petitioner did not pay the \$5.00 filing fee or submit a motion to proceed *in forma pauperis* that includes (1) an affidavit swearing that Petitioner is unable to pay the filing fee, 28 U.S.C. § 1915(a)(1), and (2) a prison certification of Petitioner's inmate trust fund account, 28 U.S.C. § 1915(a)(1)-(2).

CONCLUSION

For the reasons set forth above, the Clerk of Court shall administratively terminate the Petition without filing it or assessing a filing fee. Petitioner is granted leave to reopen this case, no later than **30 days from entry of this Order**, by submitting either (1) the \$5.00 filing fee or (2) a motion to proceed *in forma pauperis* that establishes Petitioner's inability to pay fees and costs and includes a completed and signed prison certification section.² The Clerk of Court is directed to send an *in forma pauperis* motion form to Petitioner. Upon Petitioner's submission within 30 days of either (1) the \$5.00 filing fee or (2) a motion to proceed *in forma pauperis* that establishes his inability to pay fees and

¹ The Court has ordered that a form motion to proceed *in forma pauperis* with supporting affirmation be mailed to the petitioner. The form also is available at <http://www.nywd.uscourts.gov/pro-se-forms>.

² Such an administrative termination is not a "dismissal" for purposes of the statute of limitations, and if the case is re-opened under the terms of this order, it is not subject to the statute of limitations time bar if it was originally filed timely. See *Houston v. Lack*, 487 U.S. 266 (1988) (prisoner mailbox rule); *McDowell v. Delaware State Police*, 88 F.3d 188, 191 (3d Cir. 1996); see also *Williams-Guice v. Bd. of Educ.*, 45 F.3d 161, 163 (7th Cir. 1995).

costs and includes a completed prison certification, the Clerk of Court shall reopen this case without further order.

SO ORDERED.

Dated: July 21, 2021
Rochester, New York

A handwritten signature in black ink, reading "David G. Larimer", written over a horizontal line.

DAVID G. LARIMER
United States District Judge